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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALLAN C. SANCEAU, Petitioner/Appellant, v. DONNA D. SANCEAU, Respondent/Appellee.	2 CA-CV 2008-0134 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20072046

Honorable Kenneth Lee, Judge

AFFIRMED

Schwanbeck & Present, P.L.L.C.
By Victor R. Schwanbeck
Tucson
Attorneys for Petitioner/Appellant

Donna Dean Sanceau
Tucson
In Propria Persona

E S P I N O S A, Presiding Judge.

¶1 In this appeal, Allan Sanceau challenges the trial court's order granting spousal maintenance to his former wife, Donna Sanceau. He contends the court abused its discretion

in determining the duration and amount of Donna's award. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 In June 2007, Allan filed a petition for dissolution of marriage. At that time, the parties had been married for over nine years and had three minor sons, all of whom had been diagnosed with varying degrees of autism. Currently, the children are fifteen, eight, and five years old.

¶3 The parties agreed to joint custody and a parenting time plan, with Allan having the children 45% percent of the time and Donna 55%.[1] The parties also agreed that Allan would remain in the marital home and would be responsible for the mortgage and home equity loan. Allan testified that he owes approximately $30,000 more than the home is currently worth, due in part to the home equity loan that was used for communal expenses.

¶4 The primary dispute at trial centered on the amount and duration of spousal maintenance Donna would receive. Donna testified she is unable to work due to her responsibilities involved with the care of the children, one of whom has severe food allergies in addition to autism. Both parties offered evidence of their respective monthly expenses.

¶5 The trial court found that Donna qualified for spousal maintenance and awarded her $1,100 per month until her death, remarriage, or the youngest child's eighteenth birthday. The court also ordered Allan to pay Donna $1,555 per month in child support. The court

[1]Pursuant to the parenting plan, Allan has the children on alternating weekends, Tuesday overnights, alternating Thursday overnights, certain holidays, and for five and a half weeks of the children's thirteen weeks of school vacations.

determined that Donna was able to work part-time and imputed to her $583 in gross monthly income. The court subsequently revised its order because it had failed to credit Allan for his 164 days of parenting time. In its revised order, after noting that the awards for spousal maintenance and child support were "inextricably linked," the court lowered the child support to $665 per month and increased the spousal maintenance award to $2,000 per month.

¶6 After Allan filed a notice of appeal, this court stayed the appeal and revested jurisdiction in the trial court, directing it to redetermine the amount of spousal maintenance in light of a complication in the parties' allocation of a communal debt.[2] After conducting a hearing and receiving additional evidence on this and other issues, the trial court again modified its order, awarding Donna $2,100 per month in spousal maintenance and $540 in child support. The court also reversed its prior decision to impute part-time income to Donna, finding she currently is unable to work. This court has jurisdiction over Allan's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B), (C).

Discussion

¶7 Allan does not dispute that Donna is entitled to an award of spousal maintenance, but contends the trial court abused its discretion both in determining the amount and the duration of the award. We review the trial court's award of spousal maintenance for an abuse of discretion. *Cullum v. Cullum*, 215 Ariz. 352, ¶ 9, 160 P.3d 231, 233 (App. 2007).

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[2]The issue concerned Allan's receipt of approximately $1,000 less per month than the trial court had anticipated due to an outstanding loan from Allan's retirement fund, a loan the parties previously had agreed would be assigned to Donna. However, because the plan administrator had refused to assign the loan to Donna, Allan's employer was continuing to withhold approximately $1,000 per month from Allan's salary to repay it.

We look to whether the court properly considered the factors set forth in A.R.S. § 25-319(B) when it determined the amount and duration of the award of maintenance. *Id.* ¶ 15. Although a court's determination is conducted on a case-by-case basis and some of the factors in § 25-319(B) will not apply, "[t]he court may abuse its discretion if it fails to apply one of the applicable factors 'with respect to which the parties presented evidence.'" *Id.*, *quoting Elliott v. Elliott*, 165 Ariz. 128, 136, 796 P.2d 930, 938 (App. 1990). Finally, "[w]e view the evidence in the light most favorable to [the award recipient] and will affirm the judgment if there is any reasonable evidence to support it." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998).

Duration of Spousal Maintenance Award

¶8 Allan contends the trial court abused its discretion in determining that the spousal maintenance award should continue until the youngest child turns eighteen because it means that Donna will receive maintenance for fourteen years, which is four years longer than their marriage. He also contends the trial court abused its discretion in determining Donna was unable to work. Donna counters that although the parties were married in 1997, they had been sharing expenses since 1989 and had their first child in 1994. She contends the trial court correctly determined that she is unable to work because of the special needs of the children.[3]

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[3]Although Donna argues the trial court should have granted her spousal maintenance for a longer period, she has failed to file a cross-appeal and therefore we do not consider this issue. *See Berry v. Foster*, 180 Ariz. 233, 236, 883 P.2d 470, 473 (App. 1994) (issue raised on appeal not addressed because party failed to file cross-appeal). Additionally, to the extent Donna utilizes her answering brief to provide additional evidence that was not before the trial

¶9 The trial court found the parties had been together since 1989, and after their first child's birth in 1994, Donna had worked and earned significant income only in 1999, 2000, and 2001, and had not worked since their second child was born in 2001. The court also found Donna has a high school education with some college course work and "has no significant works skills at the present time to earn more than a minimum wage type job." In addition, it found the three autistic children require "ongoing treatment and therapies" and Donna "is primarily responsible for managing these treatments and taking the children to the appointments." Finally, the court determined that Donna is currently unable to work "in light of the condition of the children, their ages, and school schedules" because she "has effectively a window of at most three hours from 8:00 a.m. to 11:00 a.m. each week day where she does not have at least one of the children," which is "an insufficient window of time for [her] to realistically obtain a part-time job."

¶10 In light of these findings, which are supported by the record, we cannot say the trial court abused its discretion in setting the presumptive duration of Donna's spousal maintenance award or in its related determination that Donna currently is unable to work. *See Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993) (trial court has "substantial discretion" in setting spousal maintenance award). However, A.R.S. § 25-327(A) provides that a spousal maintenance award may be modified or terminated "on a showing of changed circumstances that are substantial and continuing." *See also Rainwater*, 177 Ariz.

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court, we disregard this evidence. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (appellate review limited to record before trial court).

at 504, 869 P.2d at 180 (noting its decision was "strongly affected by the presumptive modifiability of spousal maintenance awards"). Such a situation may include a change in circumstances that would allow Donna to work. *See, e.g.*, *Jarvis v. Jarvis*, 27 Ariz. App. 266, 268, 553 P.2d 1251, 1253 (1976) (affirming modification of spousal maintenance and child support where only two of six children remained in home and wife was able to obtain employment).[4]

Amount of Spousal Maintenance Award

¶11 Allan also challenges the amount of spousal maintenance and contends the trial court failed to consider his ability to pay this amount while still meeting his own expenses. He points to A.R.S. § 25-319(B)(4), which requires the court to consider "[t]he ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance." *See also Cullum*, 215 Ariz. 352, ¶ 23, 160 P.3d at 236 (financial obligations of supporting spouse "are a consideration in awarding spousal maintenance").

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[4]Allan asserts the trial court improperly determined that Donna could not afford child care, and, therefore, could not work due to the loss of Social Security benefits for two of the boys. He contends the court's original determination that Donna was able to work part-time was not based on her receipt of Social Security benefits but instead was based on the $236 Allan was ordered to pay for their youngest son's child care, and her subsequent "election to keep [their youngest son] out of the after care program has absolutely nothing to do with Social Security." However, Donna testified she had removed their youngest son from child care because of "personal hygiene issues at the school" and "[t]here is no care available now." Thus, based on this record, we cannot conclude the trial court abused its discretion in determining Donna was unable to work. Again, however, the trial court may modify its decision upon a substantial change in circumstances. *See* § 25-327(A).

¶12 The trial court, in its final order concerning spousal maintenance and child support, reviewed Donna's monthly expenses and determined her "minimum monthly financial need" to be $2,655. The court also analyzed a number of Allan's expenses. For example, it determined he had incorrectly calculated the tax withholding on his bonus and noted that several payroll deductions were optional. It also stated that Allan had failed to present evidence as to the tax withholding exemptions he was claiming and whether he received a tax refund. However, it did not make a finding that Allan would be able to afford the $2,100 spousal maintenance award or discuss Allan's other monthly expenses.

¶13 Allan presented the trial court with detailed evidence of his monthly expenses, which include $1,351 for his mortgage and $615 home equity loan payments, $1,996.37 in tax withholdings, $714.20 for health insurance, $32.79 in disability insurance, $997.08 to repay the retirement fund loan, $345 for utilities, $274 for telephone/business telephone/internet,[5] $327 in vehicle insurance and fuel, $690.81 for costs associated with parenting time,[6] and $200 for food for himself. Subtracting these amounts—none of which includes the amounts (other than tax withholdings) questioned by the trial court—from Allan's monthly gross income of $9,545, he is left with $2,001.75. Subtracting Allan's child support ($540) and spousal maintenance ($2,100) payments from this amount, Allan is left with a deficit of

[5]Allan works from his home.

[6]Allan indicates this figure was calculated pursuant to the child support guidelines in A.R.S. § 25-320(11). Because Donna does not challenge this amount, we presume it is correct.

$638.25 each month. This deficit does not include the marital debts that were assigned to Allan, which total $1,070 per month, or his individual debts, including student loans.

¶14 Although the trial court failed to make specific findings pursuant to § 25-319(B)(4) concerning Allan's ability to pay the spousal maintenance award while meeting his own needs, we presume the trial court considered all of the evidence before issuing its decision. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004). Allan cites cases from other jurisdictions that have overturned support awards that exceeded a supporting spouse's ability to pay, but he has failed to cite any Arizona authority that would prohibit such an award.[7] In cases such as this, we recognize there may not be sufficient funds to support two households, causing one or both spouses to incur additional debt. Unfortunately this appears to be the case here, but we cannot say the trial court abused its discretion in

[7]Allan relies on *Greco v. Greco*, 880 A.2d 872 (Conn. 2005) and *Fields v. Fields*, 533 So. 2d 922 (Fla. Dist. Ct. App. 1988). In *Greco*, the trial court awarded the plaintiff 98.5% of the marital property and ordered the defendant to pay $710 per week in alimony and to maintain two substantial insurance policies for the plaintiff's benefit. 880 A.2d at 874, 880. The Connecticut Supreme Court found that "the payment of alimony and insurance premiums alone leave the defendant with an annual net income deficit of $1500.16." *Id.* at 881. In holding the trial court had abused its discretion, the court explained, "Requiring that the defendant pay alimony that consumes his income and distributing the marital property in this manner offends the long settled principle that the defendant's ability to pay is a material consideration in formulating financial awards." *Id.* In *Fields*, the trial court ordered the husband to pay $1,000 per week in temporary alimony. 533 So. 2d at 923. In reversing the award, the *Fields* court explained the award exceeded the husband's net weekly salary of $984 and therefore violated authority which held that temporary support awards may not exceed the spouse's ability to pay. *Id.* at 924. Neither of these cases is on point because both concerned situations where the maintenance award consumed more than the supporting spouses' net income. In Allan's case, on the other hand, Donna's support award does not consume all of Allan's net income.

fashioning the spousal maintenance award as it did after it considered the factors listed in § 25-319(B).[8] Accordingly, we affirm the court's decision.

Disposition

¶15 For the reasons set forth above, we affirm.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge

[8]Although it was not required to make factual findings on every factor listed in § 25-319(B), the trial court's findings fail to make clear whether it believed Allan is able to afford the maintenance award or instead that he cannot afford it but nevertheless must pay it based on Donna's needs. In such a situation, we would be inclined to remand this matter so that the court could make additional findings on this issue. *See Anderson v. Contes*, 212 Ariz. 122, ¶ 12, 128 P.3d 239, 242 (App. 2006) (explaining appellate court may vacate and remand for clarification and additional findings). However, because we conclude the trial court did not abuse its discretion under either scenario, such a remand is not necessary.